Supreme Court, U.S.
FILED
AUG 15 2014
OFFICE OF THE CLERK

No. 14-46

IN THE

Supreme Court of the United States

STATE OF MICHIGAN, ET AL.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

AMICUS CURIAE BRIEF OF MURRAY ENERGY CORPORATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

J. VAN CARSON
Counsel of Record
GEOFFREY K. BARNES
JOHN D. LAZZARETTI
ROBERT D. CHEREN
SQUIRE PATTON BOGGS (US) LLP
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114
(216) 479-8559
van.carson@squirepb.com

Counsel for Murray Energy

August 15, 2014

QUESTION PRESENTED

Congress ordered EPA to regulate power plants under Clean Air Act Section 112 only if the agency determined it would be "appropriate and necessary" because Congress recognized that this would undo a century of state and local decisions on how best to provide affordable and reliable electricity. Congress also amended Clean Air Act Section 111 to provide a more flexible alternative that preserves a far greater role for the states.

Can EPA find it is "appropriate and necessary" to regulate power plants under Section 112 without first considering the Section 111 alternative?

CONTENTS

QUESTION PRESENTED i

CONTENTS ii

TABLE OF AUTHORITIES iii

INTERESTS OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

REASONS FOR GRANTING THE WRIT 5

1. Regulating power plants under Section 112 would undo state and local government efforts to provide affordable and reliable electric power and supplant the traditional role of the states. 5

2. The lower court upheld EPA's decision based on EPA's erroneous claim that no alternative to Section 112 existed. 9

3. EPA's refusal to evaluate an alternative that would have preserved a larger role for states implicates important federalism concerns that make this case worthy of review. 12

4. EPA's decision to usurp state authority over power plants and impose a stringent nationwide standard will be permanent without the Court's review at this time. 14

CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Bond v. United States
134 S. Ct. 2077 (2014) 12

FERC v. Mississippi
456 U.S. 742 (1982) 5

FPC v. East Ohio Gas Co.
338 U.S. 464 (1950) 5, 13, 16

General Motors Corp. v. Tracy
519 U.S. 278 (1997) 6

New Jersey v. EPA
417 F.3d 574 (D.C. Cir. 2008) 14

New State Ice Co. v. Liebmann
285 U.S. 262 (1932) 6

Younger v. Harris
401 U.S. 37 (1971) 4

Statutes and Other Authorities

Clean Air Act Section 111
42 U.S.C. § 7411 9–10

Clean Air Act Section 112
42 U.S.C. § 7412 ..... 7, 14

Pub. L. No. 101-549, § 108(g)
104 Stat. 2399, 2467 (1990) 9

76 Fed. Reg. 24,976 (May 3, 2011) 8–11, 13

77 Fed. Reg. 9,304 (Feb. 16, 2012) 6

THE POWER INDUSTRY AND THE PUBLIC INTEREST
(1944) 6

Robert L. Swartwout, *Current Utility Regulatory Practice from a Historical Perspective*
32 NAT. RES. J. 289 (1992) 6

INTERESTS OF THE *AMICUS CURIAE*

Murray Energy Corporation ("Murray Energy") respectfully supports the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.*

Murray Energy is the largest privately-owned coal company in the United States and the fifth largest coal producer in the country, employing roughly 7,300 workers in the mining, processing, transportation, distribution, and sale of coal. In 2014, Murray Energy expects to produce 65 million tons of coal from twelve active coal mining complexes in six states. Murray Energy also owns 2 billion tons of proven or probable coal reserves in the United States.

Murray Energy sells coal to public and private power plants. Affordable and reliable power, much of which is generated by coal, remains essential to the health of our nation's economy. Murray Energy and its employees proudly serve their public and private power plant customers in providing this essential service.

Here, a court has affirmed a crucial decision by EPA that failed to comply with requirements of the Clean Air Act, and that will have a dramatic adverse impact on the nation's power sector unless reviewed and overturned by the Court.

---

* No counsel for any party authored any portion of this brief. No person or entity other than Murray Energy made any monetary contribution to the preparation and submission of this brief. Murray Energy gave timely notice to counsel of record and obtained consent to the filing of this brief.

SUMMARY OF ARGUMENT

For over a century, state and local governments have constructed and supported power plants in order to provide affordable and reliable electric power. These power plants are as diverse in size and age as the states themselves and also vary widely in design.

Applying Section 112 of the Clean Air Act to these power plants will undo much of the state and local governments' efforts and effectively nationalize the power industry. Section 112 does this by forcing all existing power plants to either equal the emission levels achieved by a small set of the nation's best-performing facilities or else shut down completely. Section 112 also prohibits the construction of any new power plants unless they match the emission levels achieved by the nation's very best power plant. These requirements are imposed without regard to cost, energy requirements, or local resources.

Mindful that regulating power plants under Section 112 might well be a costly mistake, Congress ordered EPA to do so only after first evaluating the degree of health impacts from power plant emissions in light of all other Clean Air Act requirements, and then to subject power plants to Section 112 only after deciding that regulation under Section 112 was still "appropriate and necessary."

As an alternative, Congress provided Section 111 of the Clean Air Act. Section 111 is a more flexible program that considers costs, energy requirements, and the remaining useful life of existing sources. Section 111 provides a greater role for the states by tasking them with setting standards for their own existing facilities rather than imposing a uniform nationwide standard set by EPA.

In 2012, EPA decided to regulate power plants under Section 112. But in making this decision EPA defined "appropriate and necessary" so narrowly that it allowed EPA to avoid considering any factor other than whether power plant emissions posed any risks to public health whatsoever. This allowed EPA to ignore both the costs of regulating power plants under Section 112 and the alternative regulatory program Congress provided in Section 111.

EPA's decision to subject power plants to Section 112 will, by EPA's estimate, impose $9.6 billion per year in compliance costs on utilities and shutter generating capacity sufficient to power three and half million households. In the past, EPA had found that Section 111 could be used to adequately regulate power plant emissions without the need for these harsh consequences. But in EPA's latest rulemaking, EPA has refused to even *consider* the lower cost and more flexible alternative of regulating power plants under Section 111 instead. In doing so, EPA has effectively abdicated its responsibility to decide whether regulating power plants under Section 112 is "appropriate and necessary."

EPA's abdication is not only clear error in its own right, it also fails to give effect to a provision designed to properly respect the states. By providing in Section 111 a flexible alternative that would give states the primary say in deciding which power plants to shutter, if any, and ordering EPA to decide whether Section 112 regulation would be "appropriate and necessary," Congress showed deep concern and appreciation for the federalism implications of undoing a century of state and local effort and supplanting traditional state authority with the strict and inflexible Section 112 program.

Federalism "occupies a highly important place in our Nation's history and its future." *Younger v. Harris*, 401 U.S. 37, 44 (1971). EPA's refusal to consider costs and the availability of Section 111 as an alternative has allowed EPA to seize control of an important state function and force the closure of power plants built and supported by state efforts. Federalism concerns demand this action usurping state authority and intruding on legitimate state activities should not be taken lightly, if at all, and only after full and fair consideration of alternatives. As the lower court decision upholding the agency's conduct pays short shrift to these weighty concerns, this case is worthy of the Court's review.

This case also involves a rare situation where review must come now or never. The Court of Appeals has previously held that EPA's decision whether to subject power plants to Section 112 is a permanent and irreversible "listing decision." In light of this precedent, the agency cannot change its mind later, reverse its decision, or seek judicial review after these appeals have run their course. Thus, critical issues that will affect our national energy supply, as well as important issues of federalism presented by the lower court's decision, will only be addressed if the Court grants certiorari.

REASONS FOR GRANTING THE WRIT

1. Regulating power plants under Section 112 would undo state and local government efforts to provide affordable and reliable electric power and supplant the traditional role of the states.

a. *State and local governments have historically played a key role in building the nation's diverse array of power plants.*

At stake in this litigation is the fate of a century of state efforts to provide affordable and reliable electricity by building and supporting the construction of public and private power plants.

The Court has long recognized that the nation's utilities are the legacy of pioneering state efforts. As Justice Jackson stated, "[l]ong before the Federal Government could be stirred to regulate utilities, courageous states took the initiative and almost the whole body of utility practice has resulted from their experiences." *FPC v. East Ohio Gas Co.*, 338 U.S. 464, 489 (1950) (Jackson, J., dissenting); *see also FERC v. Mississippi*, 456 U.S. 742, 789 (1982) (O'Connor, J., concurring in judgment and dissenting in part) ("Utility regulation is a field marked by valuable state invention."). Indeed, nearly all power plants in this country, both public and private, are the result of significant state and local government efforts. Many were directly constructed by state and local governments. Most others owe their economic feasibility to a "regulatory compact" with the states. In exchange for territorial monopolies that protect their investments and provide the degree of certainty necessary for enormous capital outlays, private

power utilities are intensely regulated by state commissions that determine what prices they charge and what power plants they build. Robert L. Swartwout, *Current Utility Regulatory Practice from a Historical Perspective*, 32 NAT. RES. J. 289, 289–90 (1992).

Governmental support, whether direct or indirect, has proved essential for the success of power utilities, *see General Motors Corp. v. Tracy*, 519 U.S. 278, 288–90 (1997), and in this country that support has come largely from the states rather than the national government. This important legacy of state initiative is especially evident in the public power sector that provides electricity for communities that were previously unserved or underserved by private utilities. *See* THE POWER INDUSTRY AND THE PUBLIC INTEREST 104 (1944) ("Between 1882 and 1927 most municipal systems were operating in communities never before served by private companies."); 77 Fed. Reg. 9,304, 9,440 (Feb. 16, 2012) (estimating "80 municipalities, 5 states, and 11 political subdivisions" are currently operating large power plants that would be subject to regulation under Section 112).

Given the traditional role of states in cultivating the nation's power industry, it is no surprise that power plants are diverse in design, size, and age. This diversity is no accident—it is a central feature of the federal system, which allows each community to balance its own needs and resources and experiment with different solutions to the same problem. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

b. Regulating power plants under Section 112 will undo the states' historic efforts and supplant the states' traditional role in regulating power plants with an inflexible federal standard.

Applying the Section 112 regulatory program to power plants will unnecessarily and unwisely undo the decades of state and local government effort put into building and supporting the power plants that are needed to make electricity available and affordable.

By design, subjecting power plants to Section 112 will force many existing plants to shut down. Specifically, Section 112 requires existing sources in categories or subcategories with more than 30 sources to achieve emission standards that are no "less stringent than the average emission limitation achieved by the best performing 12 percent of existing sources." 42 U.S.C. § 7412(d)(3). Thus, existing power plants will have to either upgrade to match the performance of the highest performing facilities in the nation or stop operating entirely. There is no opportunity to consider costs, the age of the facility, or the needs of the community. For many power plants, this is no choice at all—application of Section 112 is a death sentence.

Section 112 also strips the states of their traditional authority to decide what types of new power plants to build. Every single new power plant must be designed to meet emission standards that are no "less stringent than the emission control that is achieved in practice by the best controlled similar source." *Id.* In other words, any new power plant must match the performance of the best-performing power plant in the nation, again regardless of costs, energy requirements, or local needs.

The result is that, under Section 112, states with more money or newer power plants will be able to set the emission standards for the entire country, forcing other states to scrap many of their existing power plants and either buy power from other states or devote hundreds of millions of dollars building new power plants, upgrading existing plants, or retro-fitting plants to accept alternative fuels.

At the outset of the underlying rulemaking, EPA acknowledged that subjecting power plants to the Section 112 program would completely transform the electric power generation fleet. 76 Fed. Reg. at 24,979. Yet EPA has refused to consider the wisdom of such a drastic reshaping of a core component of the nation's economy, despite Congress' command to take this step only if it was "appropriate and necessary."

In light of the important traditional role of state and local efforts in the power sector, EPA's finding that regulating power plants under Section 112 was "appropriate and necessary" without considering the costs of unwinding a century of state and local decisions on how best to provide a necessary utility to their citizens was a clear error with national implications and thus worthy of review by the Court.

2. The lower court upheld EPA's decision based on EPA's erroneous claim that no alternative to Section 112 existed.

EPA justified its refusal to consider the costs of Section 112 by claiming there was no alternative. *See* 76 Fed. Reg. at 24,989. The lower court, in turn, then relied on EPA's assertion that there was no alternative to Section 112 in upholding EPA's decision. Opp. at 28 (quoting 76 Fed. Reg. at 24,989). EPA's claim, however, was wrong because Congress had provided EPA with the alternative to regulate any sources whose emissions "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A). This includes regulation of new sources under Section 111(b), and regulation of existing sources under Section 111(d). Thus, the decision Section 112(n)(1)(A) required EPA to make was not *whether* to regulate power plant emissions, as EPA claimed, but whether to use Section 112 or Section 111 to regulate them.

The existence of Section 111 as an alternative to regulate power plant emissions is no happenstance. In the very legislation enacting Section 112(n)(1)(A) Congress included an amendment to provide for the regulation of sources under Section 111(d) if they were not regulated under Section 112. Pub. L. No. 101-549, § 108(g), 104 Stat. 2399, 2467 (1990). Without that key amendment, Section 112(n)(1)(A) would have required EPA to decide whether to regulate some emissions from existing power plants at all, because Section 111(d) would have excluded the pollutants listed for regulation under Section 112.

The amendment assured that Section 111 could be used to regulate any harmful power plants emissions that could be regulated under Section 112 if EPA found Section 112 inappropriate or unnecessary. This demonstrates that through Section 112(n)(1)(A), Congress intended to give EPA the choice whether to subject power plants to Section 112 or Section 111.

Section 111 is far more flexible than Section 112. Rather than mandate that EPA force all sources to match the performance of the top performing sources, Section 111 standards for new and existing sources must be designed with cost and energy requirements "take[n] into account." 42 U.S.C. § 7411(a)(1). For existing sources, the standards are designed by the states, not the federal government, and must "take into consideration the remaining useful life of the existing source." 42 U.S.C. § 7411(d)(1)–(2). Under Section 111, the single very best performing source also does not become the de facto blueprint for all other new sources.

Thus, EPA's assertion that it is "reasonable to conclude that costs may not be considered" because EPA was "evaluating whether to regulate HAP emissions from EGUs at all," 76 Fed. Reg. at 24,989, and the lower court's reliance on this assertion, *see* Opp. at 28, were clear error.

It was also inexcusable for EPA not to bring Section 111 to the lower court's attention. Not only did EPA wrongly claim that there was no alternative to Section 112, EPA disingenuously proclaimed in its rulemaking that it had no duty to identify and consider any alternatives, claiming that EPA was not "requir[ed] to scour the CAA to determine whether there is a direct or indirect manner in which EPA could regulate HAP emissions from EGUs."

76 Fed. Reg. at 24,992. In essence, the agency is saying that Congress did not expect the agency to be aware of its own authority under the very statute that EPA is charged with administering. But this is precisely the form of agency expertise that EPA claims as justification for *Chevron* deference in interpreting Section 112(n)(1)(A). Either EPA is an expert in the Clean Air Act or not. EPA cannot have it both ways. And as a purported expert in the Clean Air Act, the agency cannot feign ignorance of Section 111 as a flexible regulatory alternative for regulating the very same emissions that could be regulated under Section 112. As EPA noted in this rulemaking, EPA previously in 2005 "[s]pecifically pointed to" Section 111 regulation for power plant "HAP emissions" in finding it would not be "appropriate and necessary" to regulate power plants under Section 112, 76 Fed. Reg. at 24,985, and criticized its earlier 2000 decision for failing to "consider[] actions under" Section 111 in determining whether it would be "appropriate and necessary" to regulate power plants under Section 112. *Id.* So EPA would not have to "scour" the Act to find Section 111. EPA had already found it. EPA had even already attempted to use it to regulate the very emissions EPA claimed could not be directly regulated "at all" unless EPA subjected power plants to Section 112.

Before choosing to regulate power plants under Section 112, EPA was directed by Congress to determine that it was "appropriate and necessary." Because EPA neglected to even consider an available alternative to a rule that will have a dramatic impact on this country's energy system, and indeed led the court to believe that no alternative existed, this case is worthy of the Court's review.

3. EPA's refusal to evaluate an alternative that would have preserved a larger role for states implicates important federalism concerns that make this case worthy of review.

This case is especially worthy of the Court's review because Section 112(n)(1)(A) reflects vital federalism concerns that EPA should have considered but ignored. While Congress created a strict and inflexible federal program in Section 112, Congress simultaneously amended Section 111 in a way that would allow power plants to be regulated entirely under Section 111 in the alternative, and mandated that EPA avoid regulation of power plants under Section 112 unless EPA determined it was "appropriate and necessary." In this way, Congress provided a way to preserve, as much as possible, the decades of state and local government efforts to provide reliable and affordable power by assuring power plants would not be inappropriately and unnecessarily subjected to Section 112 regulation. This reflects a "proper respect for state functions" and serves to avoid regulations that could "unduly interfere with the legitimate activities of the States." *Younger*, 401 U.S. at 44. As made clear by the Court's decision in *Bond v. United States*, Acts of Congress "must be read consistent with principles of federalism inherent in our constitutional structure" because Congress carefully preserves the traditional role of the states. *Bond v. United States*, 134 S. Ct. 2077 (2014). The interpretation of Section 112(n)(1)(A) upheld by the court below fails on this score entirely.

Federalism is built on the fundamental premise that "the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."

Younger, 401 U.S. at 44. For "diversity" serves "values which centralization and uniformity destroy." *East Ohio Gas Co.*, 338 U.S. at 488. Protecting diversity requires "sensitivity to the legitimate interests of both State and National Governments" and especially "a proper respect for state functions." *Younger*, 401 U.S. at 44.

EPA's decision to regulate power plants under Section 112 sacrifices a great deal of state effort in favor of centralization and uniformity. While there certainly can be an appropriate role for the federal government in national environmental regulation, when Congress has provided a middle course — one that shows respect for the legitimate efforts of states by allowing for costs and energy requirements to be considered and allowing states to tailor standards to their own power plants and needs — EPA must provide a reasoned analysis of why this alternative must be rejected.

Yet EPA has refused to consider regulation under Section 111 as an alternative, instead favoring a program EPA knows will "level" the power industry and nationalize power plants. 76 Fed. Reg. at 24,979.

EPA has failed to make this decision in a way that, as Congress intended, assures that the federal government will not "unduly interfere with the legitimate activities of the States" by supplanting the role of the states going forward and by undoing decades of past effort. *Younger*, 401 U.S. at 44.

The decision whether to regulate power plants under Section 112 is imbued with highly important federalism concerns that EPA and the court below have ignored. Accordingly, this case is especially worthy of review by the Court.

4. EPA's decision to usurp state authority over power plants and impose a stringent nationwide standard will be permanent without the Court's review at this time.

Certiorari in this case is particularly important in light of the D.C. Circuit's *New Jersey v. EPA* decision. 517 F.3d 574 (D.C. Cir. 2008). In that case, the D.C. Circuit ruled that EPA's "appropriate and necessary" determination cannot be revisited once it is made. As a result, if the Court denies certiorari, the parties will not be able to challenge EPA's determination again, no matter how devastating the consequences.

Even EPA will not be able to revisit its decision. As the D.C. Circuit reasoned, Section 112(n)(1)(A) required EPA to "evaluate regulatory options with care and to meet certain conditions before listing EGUs as an HAP source under section 112(c)(1)." *New Jersey*, 517 F.3d at 579. Once this decision is made, the court held EPA can delist power plants "only after determining that 'emissions from no source in the category or subcategory concerned exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source.'" *Id.* at 579 (quoting 42 U.S.C. § 7412(c)(9)) (internal edits omitted). Thus, the D.C. Circuit reasoned, the only way for EPA to correct a "listing error" is through "section 112(c)(9)'s delisting process" or a "court-sanctioned vacatur" of EPA's original listing decision. *Id.* at 583.

As the court below rejected the petitioners' efforts to challenge the listing decision, denial of certiorari in this case would permanently foreclose further consideration and review of EPA's decision to regulate

power plants under Section 112. Unlike most petitions for certiorari, therefore, this is the only opportunity for the Court to review whether EPA properly fulfilled its obligations to the states before deciding to regulate power plants under Section 112.

CONCLUSION

Twenty-three states and one governor submitted a petition for a writ of certiorari. Below, fourteen states and the District of Columbia intervened to support EPA's decision. "This alliance of state authorities suggests that there must be more to this case than meets the eye." *East Ohio Gas Co.*, 338 U.S. at 476. Indeed, "[t]his is a real conflict in which experience shows state control will wither away and leave the federal rule in possession of the field." *Id.* at 478. But before that happens, Congress required that EPA decide how far to intrude upon traditional state authority in full view of the costs and after evaluating a more flexible regulatory alternative that would preserve a greater role for the states. EPA has failed to do so and has thereby failed to respect the states and honor their decades of efforts as Congress intended.

The Court should grant a writ of certiorari.

Respectfully submitted,

J. VAN CARSON
Counsel of Record
GEOFFREY K. BARNES
JOHN D. LAZZARETTI
ROBERT D. CHEREN
SQUIRE PATTON BOGGS (US) LLP
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114
(216) 479-8559
van.carson@squirepb.com
Counsel for Murray Energy

August 15, 2014